No. 7306

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ETHLYN B. CLEMENTS, individually and as administratrix of the estate of Ralph L. Clements, also known as R. L. Clements, deceased,

Appellant,

vs.

GEORGE W. COPPIN, as trustee in bankruptcy of the estate of the Flintex Corporation (a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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GEORGE W. COPPIN, as trustee in bankruptcy of the estate of the Flintex Corporation (a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant above named respectfully petitions that the decision of this court herein (rendered on August 29, 1934) be set aside and a rehearing of the cause be granted on each and all of the following grounds, to-wit:

(a) The opinion of this court herein lays down an erroneous rule as to the necessity of taking exceptions to a final adjudication in con-

tempt proceedings, before such adjudication can be reviewed on appeal.

(b) The opinion of this court has failed to pass upon the necessity of a finding that appellant had the present ability to comply with the turn-over order.

(c) The opinion of this court fails to pass upon the necessity that the affidavit—on which the order to show cause was predicated—contain an allegation as to the then present ability of appellant to comply with the turn-over order.

(d) The opinion of this court has confused the question of what evidence is sufficient for the court to find appellant's ability to comply with the turn-over order and the question of whether or not the adjudication of contempt must contain a finding as to such ability.

(e) The opinion of this court has ignored the presumption of innocence, with which appellant was always clothed, and allowed a presumption in conflict therewith to take its place.

(f) On the foregoing points the decision of this court herein is in direct conflict with the opinions and decisions of the Supreme Court of the United States and of other Circuit Courts of Appeals.

1. THE ORDER OF THE DISTRICT COURT, ADJUDGING APPELLANT GUILTY OF CONTEMPT, IS REVIEWABLE ON APPEAL WITHOUT ANY OBJECTION HAVING BEEN MADE OR EXCEPTION TAKEN TO THE SAME.

It is fundamental that an exception need not be taken to a final order in order to secure a review of the same on appeal.

> *Chicago etc. Ry. Co. v. Barnett,* 190 Fed. 118;
> *Maxell v. Ricks,* 294 Fed. 255.

That orders adjudicating one to be guilty of contempt and orders of commitment based thereon are final orders, reviewable as other final orders, has been repeatedly held by our appellate courts. In this behalf see:

> *Bessette v. Conkey Co.,* 194 U. S. 324, 337-338, 48 L. Ed. 997, 1005-1006;
> *Alexander v. U. S.,* 201 U. S. 117, 121, 50 L. Ed. 686, 688;
> *Shuler v. Raton Water Works Co.,* 247 Fed. 634;
> *Maxwell v. Ricks,* 294 Fed. 255.

From the foregoing it follows that the court was in error in holding that an objection had to be made and an exception taken to the final order of the District Court adjudging appellant guilty of contempt and committing her therefor.

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2. THE AFFIDAVIT ON WHICH THE CONTEMPT PROCEEDINGS WERE PREDICATED WAS INSUFFICIENT TO CONFER JURISDICTION ON THE DISTRICT COURT.

Before a court can punish one for constructive contempt the matter must be brought to the attention

of the court by an appropriate pleading. The presence of such a pleading is jurisdictional and it must contain a statement of facts which shows the commission of a contempt and must contain a prayer asking for the infliction of a punishment. Whether the contempt sought to be punished be termed a civil or criminal contempt, the necessity of such a pleading remains the same.

> "The charging paper, whether it be a petition, motion, or affidavit, of which the complaining party avails himself to invoke the court's action, must not be defective in substance but must show on its face facts sufficient to constitute a contempt and to justify the relief sought and must also have an appropriate prayer. 9 Cyc. 38; Gompers Case. If it fails in either of these respects, the accused may avail himself of such defect, even if he did not prior to the hearing of his cause object by motion, demurrer, or answer."
>
> *Phillips Sheet etc. Co. v. Amalgamated etc. Workers,* 208 Fed. 335, 344.
>
> "Since a person accused of contempt committed out of the presence of the court or judge is entitled to be informed of the nature and cause of the accusation against him, the initiatory information or affidavit is jurisdictional."
>
> 13 *Corpus Juris.*, p. 64, sec. 89.
>
> "Whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order and a prayer that he be attached and punished therefor."
>
> *Gompers v. Buck's Stove Co.,* 221 U. S. 418, 441, 55 L. Ed. 797, 806.

> "We have already shown that in both classes of cases there must be allegation and proof that the defendant was guilty of contempt, and a prayer that he be punished."
>
> *Gompers v. Buck's Stove Co.*, 221 U. S. 418, 448, 55 L. Ed. 797, 808.

> "A contempt proceeding is sui generis (Bessette v. Conkey Co.), and the Supreme Court has specified the form, or at least the essential substance of the form, of prayer for this particular kind of a proceeding, whether punishment or remedial relief, or both, be sought, and has ruled that punishment cannot be inflicted unless there is a prayer for it. See, also, Re Kahn, 204 Fed. 581 (C. C. A. 2); Anargyros v. Anargyros (C. C.) 191 Fed. 208."
>
> *Phillips etc. Co. v. Amalgamated etc. Workers*, 208 Fed. 335, 345.

In view of the language of our Supreme Court in the *Gompers* case, supra, and the other authorities above cited an inspection of the affidavit filed in this case shows that it was insufficient to justify the court in inflicting any punishment either for the purpose of coercing action on the part of appellant or of punishing her for failure to obey the order of the court. The affidavit will be found on pages 5 and 6 of the transcript and concludes with the following prayer:

> "Wherefore, plaintiff prays that an order to show cause be issued by this Court directing the defendant to appear before said Court upon a day certain to show cause why she should not be adjudged guilty of contempt for her failure and

> refusal to observe and perform the commands of said order directing her to pay over to the Clerk hereof said trust funds."

There is nothing in the affidavit praying or asking that any punishment be inflicted on appellant. The absence of such prayer is fatal to the validity of the order based thereon.

The affidavit is likewise defective in not containing any allegation as to the present ability of appellant to comply with the turn-over order. The absence of such allegation has been held, by the Circuit Court of Appeals, to be a fatal defect.

> "It contains no allegation that her failure to pay was wilfull, nor anything to show that it was not caused by mere inability. Applying strict rules, this, of course, would not be sufficient to put her on the defensive."
>
> *In re Cole,* 163 Fed. 180, 186.

The affidavit does not meet the requirement set forth in the *Cole* case or in the *Phillips* case. (Both quoted supra.) The District Court was therefore without jurisdiction to proceed in the matter or to render any determination which carried with it the infliction of any punishment or imprisonment of appellant. For these reasons alone the order should be reversed.

3. THE ORDER OF COMMITMENT IS VOID FOR WANT OF A FINDING THAT APPELLANT HAD THE PRESENT ABILITY TO COMPLY WITH THE TURN-OVER ORDER.

This identical point was raised on the appeal and is noted in the decision of this court but the opinion fails to pass upon this question.

It is true this court discusses the right of the trial court to find such present ability upon a presumption arising from the recital in the turn-over order; but the question of what is sufficient evidence to justify such a finding is entirely different than the question of the necessity of making such a finding.

Assuming, merely for the purposes of argument, that in a proceeding of this kind the court can treat the presumption of continuing ability as predominating over the presumption of innocence, it nevertheless remains incumbent on the court to make a finding to the effect that the presumption of innocence has been overcome, *i. e.,* there must be a finding of the present ability to comply with the order. The absence of such a finding is fatal to any adjudication of contempt or order of commitment based thereon.

It should require no citation of authority to support the proposition that a naked failure to obey an order of court does not constitute contempt and, in addition to such failure, there must be a present ability to comply with such order. If one, through no wilful act, has not the physical ability to comply with the order no contempt has been committed. An inspection of the order of commitment in this case (Tr. pp. 10 to 14) shows that the only finding

of fact made by the court on this point is that appellant "has wilfully disobeyed said order of this court and has wilfully failed and refused to pay over to the Clerk said sums of money, said trust funds, as aforesaid, found to be in her hands by said special master, or any part thereof". (Tr. p. 13.) Thus, all the court found was that at the time of the report of the special master the funds were in the hands of appellant and that at the time of the hearing appellant had not paid any of said funds over. There is nothing in the order which finds that at the time appellant was adjudged guilty of contempt that she then had the present ability to comply therewith. In fact, the order of commitment shows that the entire matter was determined by the court on the affidavit of appellee (which also fails to allege appellant's present ability), the order to show cause and proof that the same had been served upon appellant. The record affirmatively discloses that no testimony was taken by the court.

The rule requiring findings on all material issues to be necessary for the support and adjudication of contempt is correctly set forth in Ruling Case Law as follows:

> "a court has no right to adjudge a party to be in contempt of court without making findings of fact showing as a matter of law that the party accused is in fact guilty of contempt, or that by reference to the petition and the adoption of the facts there stated, the decree may serve the purpose of findings. * * * The only object of requiring these facts to be shown somewhere in the

record is to enable the reviewing court to see whether they amount to a contempt, and thus to determine from them the jurisdiction of the trial court. And if the procedure prescribed requires an affidavit first to be presented to the trial court containing these facts as a foundation of the proceeding, the court of review can, and does, look to the statement in the affidavit for the purpose of ascertaining whether the court below had jurisdiction, and it is not necessary to repeat the statement in the judgment. * * * *The judgment must show affirmatively the defendant's ability to comply with the order of the court."* (Italics ours.)

6 *R. C. L.* pp. 536-7.

In *Terminal Railroad Assoc. v. U. S.*, 266 U. S. 17, 69 L. Ed. 150, the necessity of findings on all facts necessary to constitute a contempt is stated by the Supreme Court, supported by an abundance of authorities, as follows:

"In contempt proceedings * * * the facts found must constitute a plain violation of the decree so read."

In each of the cases cited by this court in its decision full findings were prepared by the trial court and the decisions were rendered upon the facts as found. In the present case there is no finding to the effect that appellant had the present ability to comply with the turn-over order.

The fact that the trial court may have been justified in finding that appellant had the ability to comply with the order does not take the place of such a finding. This court has failed to pass upon the question

of the necessity of such a finding by the trial court. For this reason alone a rehearing of this matter should be granted.

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4. THE PRESUMPTION OF INNOCENCE MUST PREVAIL OVER ANY DISPUTABLE PRESUMPTION TO THE CONTRARY.

This court has justified the action of the lower court by invoking a rule to the effect that the presumption of continuing ability of appellant to comply with the turn-over order prevails until it is shown to be otherwise. In adopting this line of reasoning the court has completely ignored the nature of a proceeding of this character and the presumption of innocence that at all times protected appellant.

A proceeding of this character must be treated as a proceeding criminal in its nature, irrespective of whether the proceeding is one to coerce compliance with a decree or to punish for a disobedience of the decree (see *Bessette v. Conkey Co.,* 194 U. S. 324, 48 L. Ed. 997) and the accused is entitled to the benefits of the presumption of innocence.

> "While the 'contempt proceeding is sui generis,' it is distinctly criminal in its nature (Bessette v. W. B. Conkey Co., supra), and the accused is clearly entitled to the benefits of the common-law presumption of innocence, with its strict requirement of proof for conviction, although the pleadings may not be subject to the technical rules of the criminal law."
>
> *Garrigan v. United States,* 163 Fed. 16, 23 L. R. A. (N. S.) 1295 at 1300.

In the last cited case Garrigan was adjudged guilty of contempt and the findings set forth that he had full knowledge of the order which he is alleged to have violated. The Circuit Court of Appeals points out there was no evidence to support this finding and that on such issue *the presumption of innocence had to prevail.* The language of the court in this regard is as follows:

> "He is clearly entitled to the benefit of 'the presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf' (Coffin v. United States, 156 U. S. 432, 458, 460, 39 L. ed. 481, 492, 493, 15 Sup. Ct. Rep. 394, reaffirmed in the recent opinion of this court in Dalton v. United States, 83 C. C. A. 317, 154 Fed. 461), which arises alike in respect of notice and conduct, as 'an instrument of proof created in his favor;' and the mere inference of 'full knowledge,' derived solely from the above-mentioned facts, is without force, as we believe, to overcome the express denial of knowledge on the part of the accused, fortified by the presumption thus defined. The finding of such knowledge, therefore, is unsupported by the needful proof to authorize conviction, and cannot be upheld under the foregoing view."

See also,

Jones v. United States, 209 Fed. 585, 587.

In *Stewart v. Reynolds,* 204 Fed. 709 at 715, the Circuit Court of Appeals points out that all presumptions which apply to the trial of a criminal action must be applied in a contempt proceeding.

"In contempt cases, and especially in those which involve the charge of another criminal offense besides the contempt, the rules of evidence applicable to civil cases in reference to presumptions and the shifting of the burden of proof do not apply; but the proceedings and 'the rules of evidence and presumptions of law applied in criminal cases should be observed.' Bates' Case, supra; State v. Matthews, 37 N. H. 450, 454; United States v. Wayne, Wall. Sr., 134, Fed. Cas. 16,654; United States v. Jose (C. C.) 63 Fed. 951; In re Switzer (D. C.) 140 Fed. 976."

The presumption of innocence can only be overcome by *evidence of facts* to the contrary and where a conflict occurs between the presumption of innocence and any other disputable presumption which leads to the conclusion of guilt, *the presumption of innocence must prevail.*

In *People v. Douglas,* 100 Cal. 1, 34 Pac. 490, the court refused to give an instruction to the effect that where there are two presumptions, one in favor of innocence and the other in favor of a criminal course of conduct, the one in favor of innocence must prevail. The Supreme Court upheld the refusal of the giving of such an instruction upon the ground "there cannot be two presumptions in a criminal case. The accused is presumed to be innocent until his guilt can be established beyond a reasonable doubt".

In *People v. Scott,* 22 Cal. App. 54, 133 Pac. 496, the defendant was accused of the crime of selling land twice and in order to render defendant guilty it was

necessary to prove an effectual first sale. This involved proof of a delivery of a deed in consummation of the first sale. The evidence showed such deed to be in the hands of a third person, but there was no evidence to the effect that defendant had delivered or authorized the delivery of the deed to such person. The court held that this essential fact could not be supplied by way of presumption of delivery following from the fact of possession and in doing so said:

> "This cannot be indulged in opposition to the presumption of innocence."

In *People v. Strassman,* 112 Cal. 683, defendant was prosecuted for perjury in testifying to his ownership of certain property. The prosecution proved that at some previous time the property stood of record in the name of another and attempted to rely on the presumption of continuance of ownership in such third person. The court held that such presumption could not be invoked against the presumption of innocence and in doing so said:

> "But all such disputable presumptions give way before the presumption of innocence which belongs of right to every defendant, and which remains with him until the prosecution by convincing proof has established his guilt."

In the case at bar the appellant was clothed with the presumption of innocence and before she could be guilty of contempt in disobeying the court's order it was necessary that it be established that she had the ability to comply therewith. No presumption as to

such ability can be indulged in opposition to the presumption of innocence. The mere fact that the master found that at some previous time she had such ability did not give rise to a finding that such ability continued any more than proof that the property involved in the *Strassman* case, supra, had at one time been in the name of a third person justified the presumption that it continued to remain in the name of such person.

It was at all times incumbent on the parties complaining of appellant's violation of the order to prove that she had the ability to comply therewith. This required *proof of facts to overcome the presumption of innocence* and the burden could not be sustained by relying on a presumption in conflict with the presumption of innocence.

It follows that even though the court had found (which it did not do) that appellant had the ability to comply with the order such finding would have been erroneous, as the record discloses that no evidence as to her present ability was ever introduced and such finding would have been based solely on a presumption in direct conflict with the presumption of innocence. As was said in *In re Cole,* 163 Fed. 180, 188:

> "* * * *but when it comes to the proposition that, at any specific date or time to which the proceedings might refer, Mrs. Cole had so completely under her control funds which she could command that her failure to command them was a willful contempt of the court,* or when it comes to the

issue that funds might not have been squandered, or even wrongfully disposed of by sending them to her husband's brother, or in some other way, *there is such failure of proof that even the determination of the District Court cannot supply it.*" (Italics ours.)

The same rule is expressed in *Boyd v. Glucklich,* 116 Fed. 131, 140:

> "*The ability of a bankrupt to comply with the order of the court must be made to appear, before he can be punished for contempt. And it must be made to appear by evidence which leaves no reasonable doubt in the mind of the court on that subject.* Evidence which is merely persuasive will not suffice. He cannot be imprisoned for the purpose of exploitation." (Italics ours.)

Wherefore, appellant respectfully submits that a rehearing of the above cause be granted in order that the foregoing errors may be corrected by this court and justice done to appellant in the premises.

Dated, San Francisco,
October 5, 1934.

Respectfully submitted,

C. G. Atwood,
Leo R. Friedman,
Thomas F. McCue,
Attorneys for Appellant and Petitioner.

Certificate Of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
October 5, 1934.

Leo R. Friedman,
Of Counsel for Appellant and Petitioner.